(5)

No. 83-812

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, et al.,

Appellants,

—v.—

ISHMAEL JAFFREE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF SUBMITTED IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM

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FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Jewish Congress hereby respectfully move for leave to file the attached brief amici curiae in this case.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving

the principles embodied in the Bill of Rights. The ACLU has been involved in many of the leading First Amendment cases by which separation of church and state has been maintained.

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political, and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise Clauses.

First among the liberties secured by the Bill of Rights is a guarantee of religious liberty and complete separation of church and state. As this Court has

consistently recognized, that guarantee protects the state from the divisive consequences of religious strife over secular matters and protects religion from the intrusive and controlling hand of state regulation.

The binding precedents of this Court establish beyond question the impropriety of granting review in a case, such as this one, in which there is inadequate factual basis in the record for review of the issue presented by the Appellants. Further, the binding precedents of this Court establish beyond question the correctness of the decision of the Court of Appeals as to the specific issues which the court resolved in its decision below.

Amici therefore submit this brief and respectfully urge this Court to deny the petition for a writ of certiorari and dismiss the appeal for want of a substantial federal question; alternatively, *amici* respectfully request this Court to summarily affirm the decision of the court below as to the narrow issues of law presented therein.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a state statute permitting public school teachers to lead students in reciting a state-composed prayer at the beginning of any class period violates the Establishment Clause of the First Amendment?

2. Whether a state statute which expressly seeks to encourage religious activity by providing at the beginning of the school day for a moment of meditation or prayer violates the Establishment Clause of the First Amendment?

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I

INTEREST OF THE AMICI

The interest of the amici curiae appears in the foregoing Motion for Leave to File a Brief Amici Curiae.

I

STATEMENT OF THE CASE

Ishmael Jaffree initially brought this action to challenge various school-prayer activities 1/ openly practiced in the Mobile County, Alabama public schools attended by his children. Those activities were conducted by public school teachers, with the knowledge and approval of their supervisors -- despite Jaffree's repeated objections. (J.S. App. at 3d-7d.) The activities challenged in the original complaint were initiated by the teachers themselves

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1/ The evidence presented at trial established that public school teachers led their classes in the recitation of the Lord's Prayer, the singing of religious songs, and other clearly religious activities. (J.S. App. at 3d-7d.)

and were not authorized by any official state or school board policy.

Jaffree later amended his complaint to challenge two Alabama statutes, one authorizing recitation of a state-composed prayer at the beginning of each public school class 2/ and the other

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2/ Ala. Code Section 16-1-20.2 provides:

> From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the World. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

authorizing a moment of silent meditation or prayer at the start of each school day.3/ The district court, after taking evidence on the purpose and effect of the statutes in question, granted Jaffree's motion for a preliminary injunction barring continuation of the authorized practices. (J.S. App. at 64d.)

For trial, the district court severed Jaffree's challenge to the statutes from his challenge to the non-statutory prayer

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3/ Ala. Code Section 16-1-20.1 provides:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

activities. The court tried Jaffree's challenge to the non-statutory practices on the merits and, after the trial, dismissed Jaffree's complaint. In an opinion that admittedly disregarded and frequently disparaged the decisions of this Court, the district court held that "the United States Constitution does not prohibit the state from establishing a religion." (J.S. App. at 49d.)

The district court also dismissed Jaffree's challenge to the two statutes. In a brief opinion, the court reiterated its view that "the first amendment does not bar the states from establishing a religion" and held that Jaffree had "fail[ed] to state any claim for which relief could be granted under the federal Constitution." (J.S. App. at 59d.)

The district court's decisions in

both actions were stayed by Circuit Justice Powell (J.S. App. at 1e) and unanimously reversed by the Eleventh Circuit. In a consolidated opinion, the appellate court concluded that both the nonstatutory practices and the two statutes violated the First Amendment. (J.S. App. at 1a.)

The defendants in Jaffree's original complaint have petitioned this Court for certiorari as to their non-statutory activity, 4/ and the State of Alabama

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4/ Amici oppose the petition for certiorari in No. 83-804. However, because the Mobile County, Alabama school-prayer activities so blatantly offend the Establishment Clause values consistently reiterated by this Court in virtually all of its relevant decisions, from Abington School District v. Schempp, 374 U.S. 203 (1963), to Treen v. Karen B, 415 U.S. 913, 102 S.Ct. 1267 (1982),

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and a group of defendant-intervenors below have appealed to this Court as to the two statutes.

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summarily affirming Karen B v. Treen, 653 F.2d 897 (5th Cir. 1981), amici have elected not to burden the Court with additional briefing in support of contentions well known to the Court and aptly articulated by the Eleventh Circuit. (J.S. App. at 1a.) Indeed, even the government of the United States does not propose that this Court review that Eleventh Circuit decision. Brief for the United States as Amicus Curiae in No. 83-812.

Similarly, because the intervenor-defendants' appeal to this Court in No. 83-929 is entirely repetitive on both the school prayer activities issue and the statutory issues, amici have not formally appeared in that case. However, amici oppose the relief sought by the appellants in No. 83-929 for the reasons given in this brief.

II

SUMMARY OF ARGUMENT

The two school-prayer statutes in this case, as well as the school-prayer activities in the companion case (No. 83-804), are the product of a pattern of flagrant defiance of this Court's Establishment Clause decisions by Alabama government officials intent on injecting prayer into the public school curriculum. These cases clearly demonstrate the dangers of permitting any breach in the well-established prohibition against government-sponsored prayer in the public schools. Here, children were subjected to religious practices which they found objectionable and about which their parents complained repeatedly -- to no avail. The

statutory devices used to foist these religious practices on unwilling victims were a statute specifically incorporating a sectarian prayer to be recited in the public school classrooms and a meditation or prayer statute which was enacted for the very purpose of circumventing the First Amendment and the decisions of this Court.

A statute containing a state-composed prayer to be recited in the public schools (Ala. Code Section 16-1-20.2) violates the Establishment Clause as interpreted by the decisions of this Court. Engel v. Vitale, 370 U.S. 421 (1962). The arguments advanced by appellants -- that the Fourteenth Amendment did not apply the First Amendment to the states, and that in any event such a state-composed prayer is not

violative of principles of church-state separation -- are stale and have been repeatedly addressed and conclusively repudiated by this Court.

Alabama's meditation or prayer statute (Ala. Code Section 16-1-20.1), which is only slightly more circumspect in bringing into the public schools the quintessentially religious practice of prayer, also violates the Establishment Clause. The meditation or prayer statute was designed to advance religion. The sponsor of the legislation left no doubt that the statute was calculated to introduce religious activity into the public schools. He testified at the district court's hearing on the preliminary injunction that the statute's purpose "was to return voluntary prayer to the public schools." (J.S. App. at

71d.) The defendants offered no evidence to the contrary. Based on that record, the district court concluded as a matter of fact that the meditation or prayer statute was "an effort on the part of the State of Alabama to encourage a religious activity." (J.S. App. at 71d-72d.) And, an analysis of the record below indicates clearly that Alabama's meditation or prayer statute offends all three of the Establishment Clause tests articulated by this Court: its purpose was religious, its effect was religious, and it entangled the government and religion.

Finally, inasmuch as every student always retains the right to pray silently whenever the student so chooses, the meditation or prayer statute is not necessary to "accommodate" that right. To the contrary, the statute illuminates

the real difference between silent, voluntary, student-initiated prayer -- which is always permissible and is undoubtedly protected by the First Amendment -- and government-promoted prayer, which is just as certainly unconstitutional.

III

THE DECISION OF THE COURT OF APPEALS INVALIDATING THE ALABAMA STATUTE AUTHORIZING PUBLIC SCHOOL PRAYERS SHOULD BE SUMMARILY AFFIRMED.

Alabama has provided by statute (Ala. Code Sec. 16-1-20.2) for public recital of a short prayer at the beginning of each day in public school classrooms. The prayer is explicitly religious and is expressly addressed to God. 5/

All of the parties in this case and both courts below concede that the constitutionality of the statute, and of the activity it authorizes, is squarely foreclosed by controlling decisions of

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5/ See text of prayer, supra at n. 2; see also Appellants' Jurisdictional Statement, "Questions Presented" at i, which specifically describes the recitation as "a prayer to God."

this Court. 6/ Nonetheless, the district court ignored the teachings of this Court and upheld Alabama's school prayer statute. Audaciously disregarding dozens of this Court's precedents, the district court ruled that "the first amendment to the United States Constitution does not bar the states from establishing a religion" and, therefore,

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6/ Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). See J.S. in No. 83-929 at 21-28; J.S. in No. 83-812 at 15-29, esp. 26-29; Pet. for Cert. in No. 83-804 at 28-29; Brief for the United States at 15-16; J.S. App. at 72d (preliminary order of the district court); id. at 16d, 48d (final decision of the district court); id. at 5a, 17a-18a (decision of the Court of Appeals); id. at 4e-5e (order of Powell, Circuit Justice). Indeed, Justice Powell, sitting as Circuit Justice, stated flatly that Engel and Schempp "control this case." J.S. App. at 5e.

that it does not prohibit the public school prayer authorized by this statute. (J.S. App. at 59d.)

The Court of Appeals properly and unanimously reversed the trial judge. (J.S. App. at 17a-18a.) Yet the Appellants press the reasoning of the trial judge in their appeal to this Court. 7/ Their argument rests on two long since discredited theories: first, that "the framers of ... the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal

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7/ The United States as amicus de-emphasizes this aspect of their appeal, does not suggest that the district court was correct, and does not contend that the Court of Appeals should be reversed as to this statute. Brief of the United States as Amicus Curiae at i, 15-16.

government and religion," J.S. App. at 27d; and, second, that the fourteenth amendment "did not incorporate the first amendment against the states." Id. at 29d.

The cases -- and, more importantly, the principles -- that this Court is asked to discard constitute the very core of this Court's Establishment Clause jurisprudence developed over a period of nearly forty years. Moreover, this Court repeatedly has examined each of the issues raised and all of the relevant evidence cited by the Appellants, and in thorough opinions consistently has rejected each of their arguments. 8/

8/ For example, in Everson v. Board of Education, 330 U.S. 1 (1947),

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Were this Court to allow a district court judge to reopen questions as well settled as those raised in this lawsuit, no decision of this Court would be immune

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> notwithstanding differences on the application of the law to the facts before them, all nine Justices expressed a common, expansive view of the history and purpose of the Establishment Clause and specifically rejected the contention, advanced by the Appellants here, that the Clause was intended to prohibit only a national religion. Id. at 8-16 (majority opinion per Black, J.); id. at 31-43 (Rutledge, J., dissenting). Similarly, in McCollum v. Board of Education, 333 U.S. 203 (1948), Justice Frankfurter, in a scholarly opinion examining the historical evidence afresh, thoroughly repudiated the narrow interpretation of the Establishment Clause urged by the Appellants in this case. Id. at 212-32 (Frankfurter, J., concurring). And, in Abington School District v. Schempp, supra, Justice

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from challenge. District court judges might assume a license to re-examine wholesale the teachings of this Court. Such instability in the law cannot be tolerated. This Court's decisions in the school prayer cases have implemented the values embodied in the Establishment

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> Brennan wrote a lengthy concurring opinion considering and decisively rejecting each of the Fourteenth Amendment "incorporation" arguments advanced by the Appellants. Id. at 253-304 (Brennan, J., concurring). See also McGowan v. Maryland, 366 U.S. 420, 441-42 (1961); Engel v. Vitale, supra, at 425-36; Walz v. Tax Commission, 397 U.S. 664, 681-87 (1970) (Brennan, J., concurring).
>
> As the Court stated in Schempp, supra, 374 U.S. at 217, referring to arguments such as those made by the appellants, "Such contentions, in the light of consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises."

Clause, and respect for this Court demands adherence to those decisions.

In one of the first of those decisions, this Court held that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." Engel, supra, at 425. That principle warrants emphatic reiteration in this case by the summary affirmance of the decision of the Court of Appeals.

IV

THE DECISION OF THE COURT OF APPEALS INVALIDATING THE ALABAMA MEDITATION OR PRAYER STATUTE SHOULD BE SUMMARILY AFFIRMED.

A. The Decision Below Is an Inappropriate Vehicle For Considering the Validity of Moment of Silence Statutes Generally

The district court viewed this case as a vehicle for an unbridled and polemical re-examination of this Court's Establishment Clause precedents. The record it developed consists primarily of "scholarly" interpretations -- contrary to views expressed by this Court -- of the intent of the Framers of the First and Fourteenth Amendments. On appeal, the parties and the Court of Appeals devoted their attention to the bizarre constitutional rulings promulgated by the district court.

Nonetheless, the record developed in the district court did establish that the Alabama meditation or prayer statute was the product of a deliberate effort to bring religion into the public schools. In its initial decision issuing the preliminary injunction, the trial court found that the enactment of Section 16-1-20.1, Alabama's meditation or prayer statute, was "an effort on the part of the State of Alabama to encourage a religious activity." J.S. App. at 71d-72d. The court reached this conclusion on the basis of testimony by a state legislator to the effect that "his purpose in sponsoring Section 16-1-20.1 was to return voluntary prayer to the public schools." Id. at 71d. Because the district court rejected the controlling decisions of this Court, its

factual finding as to the purpose of the legislature in enacting the statute was immaterial to its ultimate disposition of the case. However, in reversing the district court and holding the statute unconstitutional, the Court of Appeals reiterated, and expressly based its ruling on, the trial court's factual findings:

> The objective of the meditation or prayer statute (Ala. Code Section 16-1-20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. Jones, 544 F. Supp. at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. Beck v. McElrath, 548 F. Supp. 1161 (M.D.Tenn.1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot

> participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16-1-20.1 in violation of the establishment clause.

J.S. App. at 18a (emphasis added).

The Appellants -- and particularly the Solicitor General as amicus curiae -- urge this Court to grant review in this case to resolve the general question of the constitutionality of moment-of-silence statutes. In urging that view upon this Court, they argue that the judgment of the Court of Appeals "must be considered one of facial invalidity." Brief of Solicitor General at 8. But this argument misrepresents the holding of the Court of Appeals and ignores that court's express statement

that it was not holding moment-of-silence statutes unconstitutional per se, but rather that it was simply invalidating the Alabama statute before it based upon a factual finding of religious purpose and effect. (J.S. App. at 18a.)

Because of the limited nature of the holding below, summary affirmance or dismissal of this appeal would not foreclose further percolation in the lower courts on the validity of moment-of-silence statutes, 9/ and this

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9/ For example, in May v. Cooperman, 572 F. Supp. 1561 (D.N.J.1983), appeal docketed, No. 83-5890 (3rd Cir., Dec. 9, 1983), a challenge to New Jersey's moment-of-silence provision, the district court compiled a voluminous trial record showing the legislative intent, the political context in which the statute was enacted, and the experiences of teachers and students -- both supporters and opponents of the moment-of-silence statute -- before and after the enactment of the statute.

Court will have ample opportunity to consider the validity of moment-of-silence provisions in a context that is not distorted by the peculiar history of this case. 10/

10/ The constitutional evaluation of moment-of-silence statutes usually will turn on the political context of their passage, the intent of those who enacted them, the public perception of them, and the manner of their enforcement. See Note, The Unconstitutionality of Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv. L. Rev. 1874, 1879-81, 1890-91 (1983). See generally Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364 (1983). This is simply not the right case for a judicious analysis of these sensitive issues.

B. The Court of Appeals Correctly Concluded that the Alabama Meditation or Prayer Statute Violates the Establishment Clause

The Establishment Clause of the First Amendment, which mandates strict separation of church and state, must be most vigorously enforced where attempts are made to employ our public schools in the service of religion. See L. Tribe, American Constitutional Law 825 (1978). See also, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Karen B v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 455 U.S. 913 (1982). Strict scrutiny to ensure compliance with the Establishment Clause is justified in the context of public schools for several reasons. First, compulsory attendance laws and the impressionability of young children

combine to produce a subtle coercive effect whenever religious practices are present in the public schools. See Schempp, supra, 374 U.S. at 287-93 (Brennan, J., concurring). Second, parents have a strong interest in the religious education of their children. See Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972). Third, because the public schools are our society's official instrumentality for inculcating democratic values, the involvement of those schools with religion is likely to foster the perception that the state has given its imprimatur to authorized religious beliefs. See McCollum v. Board of Education, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring). See generally Note, Daily Moments of Silence in Public Schools: A Constitutional

Analysis, 58 N.Y.U. L. Rev. 364, 375-80 (1983).

In Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), this Court articulated a three-part test for deciding cases under the Establishment Clause: "[T]o pass muster under the Establishment Clause, the law in question first must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion." Id. at 773 (citations omitted). Measured against this standard, the Alabama meditation or prayer statute is clearly unconstitutional.

(1) Purpose. The Establishment Clause requires invalidation of any law

whose predominant purpose is to advance religion. See Stone v. Graham, supra, 449 U.S. at 40-41. This Court has invalidated statutes even where their proponents purported to muster secular purposes for the legislation, if the secular purposes advanced were post hoc rationalizations. See, e.g., Schempp, supra, 374 U.S. at 223; Stone, supra, 449 U.S. at 41.

All of the available evidence indicates that the Alabama meditation or prayer statute has a predominantly, if not solely, religious purpose.

(a) The statute explicitly states that the purpose of the moment of silence is "meditation or voluntary prayer." 11/

11/ That no one is required to pray is, of course, immaterial to the Establishment Clause analysis, see Engel, supra, 370 U.S. at 430, much less to the question of the statute's purpose.

There exists a different statute, Ala. Code Section 16-1-20, not challenged in this case, which also provides for a moment of silence at the commencement of the school day. 12/ In all relevant respects, 13/ Section 16-1-20 is

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12/ Alabama Code Section 16-1-20 provides:

> At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

Compare with the text of Section 16-1-20.1 as given in note 2, supra. Section 16-1-20.1 was not intended to amend or revise Section 16-1-20, as both remain on the statute books.

13/ Section 16-1-20 applies only to the first through the sixth grades. Section 16-1-20.1 applies by its terms to all grades.

identical, word for word, to the statute challenged in this litigation -- except that Section 16-1-20 provides for a moment of silence for meditation only, not for a moment of silence for meditation or prayer. The meditation or prayer statute challenged here was enacted three years after Section 16-1-20. At least as to the first six grades, the statute challenged in this case serves no purpose whatsoever except to provide a moment of silence for prayer. This statutory history demonstrates irrefutably the religious purpose underlying Section 16-1-20.1

(b) The district court found as a matter of fact, based in part on the testimony of the sponsor of the meditation or prayer provision, that the purpose of the statute was "to return

prayer to the public schools." Thus, the meditation or prayer statute, like the state-composed prayer statute, was an attempt by Alabama to evade this Court's rulings by prohibiting state sponsored prayer in the public schools.

(c) That the meditation or prayer statute requires a minute of silence only at the beginning of the school day underscores its religious purpose. If the statute had a secular purpose, such as facilitating discipline and promoting intellectual composure, it would authorize teachers to call for a moment of silence whenever they felt it would be educationally valuable. 14/ As provided

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14/ If the statute is not meant to encourage prayer, it has no purpose at all. Undoubtedly schoolteachers do not need specific statutory authorization to call for silence in the classroom.

by this statute, the moment of silence for meditation or voluntary prayer seems clearly designed to create a religious ritual as the official opening of the school day.

The Appellants seem to concede that the predominant purpose of Section 16-1-20.1 is religious. (J.S. in No. 83-812, at 8-9.) They argue, however, that any claimed secular purpose should suffice to save it unless the primary effect is also religious, citing Mueller v. Allen, ___ U.S.___, 103 S.Ct. 3062 (1983). Their appeal to Mueller is inapposite. In that case, this Court upheld a program of tax relief to parents of school children against Establishment Clause attack despite assertions that the aid predominantly benefitted parents with children in parochial schools. The state program, however, involved a clearly

valid secular purpose, namely, state aid to education, and there was no question that the predominant purpose of the tuition program was the advancement of education. Nothing in Mueller suggests that this Court has eliminated purpose as a separate element of its Establishment Clause analysis. Moreover, as noted above, this Court has consistently distinguished between indirect aid to parochial schools and direct injection of religion into the public schools. Cf. Everson, supra; Zorach v. Clauson, 343 U.S. 306 (1952).

(2) Effect. The Establishment Clause prohibits laws whose primary effect is the advancement or inhibition of religion. Everson, supra, 330 U.S. at 15. Indeed, a statute is invalid whether

its primary effect is to aid all religions or is to advance only one or a few. Id. The Alabama meditation or prayer statute clearly has the direct and immediate effect of advancing religion generally, as well as advancing the religion of some over that of others.

First, by specifically promoting prayer during the moment of silence, the state has indicated a special preference for that uniquely religious activity and has thus given its imprimatur to the advancement of religion, with all the special dangers of coercion and confusion that are likely to arise in the context of public schools.

Second, by adopting a minute of silence as a means of engaging in that prayer, Alabama has adopted a manner of religious observance common to some, but not all, religions. Protestants commonly

bow their heads and clasp their hands together in silence while praying. Traditionally, however, Catholics kneel to pray. Muslims may kneel on prayer rugs, face in the direction of Mecca, and call upon Allah out loud. For Quakers silence itself is prayer. For others, prayer must be vocal. Alabama's meditation or prayer statute has mandated that all students assume the posture of one traditional form of prayer. The Alabama statute thus grants official approval to one particular mode of religious devotion by suggesting that prayer is done in one certain way. Moreover, by enforcing a moment of silence in a seated or standing position, the statute necessarily permits adherents of some faiths to pray while it prevents those whose religious practices diverge

from the official model from doing so, thereby favoring the former over the latter.

Given the ritual character of a daily moment of silence and the predictable religious expressions of many teachers and students, setting aside a time for prayer in the classrooms will impress school children with the view that the daily moment of silence is a state-sponsored religious observance.

(3) Entanglement. In its Establishment Clause decisions, this Court has expressed concern about both administrative entanglement (excessive institutional interference between church and state) and political entanglement (political division along religious lines). See generally L. Tribe, American Constitutional Law Section 14-12 (1978).

While concededly there is no administrative entanglement between church and state as a result of this statute, it would certainly promote divisiveness among and between religious groups. This Court has noted the insidious effect of such divisiveness, Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971), especially when it occurs in the highly charged political atmosphere surrounding our public schools. See generally W. Muir, Law and Attitude Change (1973); D. Ravitch, The Great School Wars (1974); D. Ravitch, The Troubled Crusade: American Education, 1945-1980 (1983). As evidenced by the number of defendant-intervenors (over 600), the political furor created by this case alone stands as testimony to the need to remove these issues from the political arena.

C. The Alabama Meditation or Prayer Statute Is Not Justified as an "Accommodation" of the Desires of Children Who Wish to Pray

Appellants argue that the meditation or prayer statute is a legitimate accommodation of the free exercise and free speech rights of schoolchildren. The arguments of Appellants and the United States as amicus rest on the erroneous proposition that moments of silence are necessary to "accommodate" students who wish to pray. This argument misconceives Engel, distorts the accommodation doctrine beyond recognition, and effectively writes the Establishment Clause out of the Constitution.

Those who believe that, in the words of the Solicitor General, "private prayer should be an integral part of life's

activities (including school)," Brief of United States at 10, are entirely free to exercise that belief whenever they choose to pray silently. They do not need the State of Alabama to suggest the idea or to tell them when to do it. Nothing in the Constitution prohibits students from praying -- at any time. The Establishment Clause decisions hold, however, that the government may not conduct religious exercises or promote student prayer.

The "accommodation" principle applies only where there is a clash between an individual's religious beliefs and governmental activity. 15/ There is no

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15/ See, e.g., Thomas v. Review Board, 450 U.S. 707 (1981), Wisconsin v. Yoder, 406 U.S. 205 (1972), or

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such clash here. Nothing school officials must do to comply with Engel and Schempp compels them to prohibit students from privately engaging in prayer or religious activities. And, this Court has stated that "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use

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Sherbert v. Verner, 374 U.S. 398 (1963). Affirmance would not cast doubt on the practices properly characterized as accommodation in those cases, for the simple reason that nothing in Engel or Schempp in any way burdens the practice of religion by any individual. Nor would affirmance threaten the religious accommodation provisions of Title VII of the 1964 Civil Rights Act, as argued in Brief of United States at 12n-13n, see Petition for Certiorari and Motion of the State of Connecticut to Intervene and Brief in Support of Petitioner in Estate of Thornton v. Caldor, Inc., No. 83-1158.

the machinery of the State to practice its beliefs." Schempp, supra, 374 U.S. at 226 (emphasis in original). The accommodation principle cannot properly be invoked here without converting every establishment of religion into an "accommodation." 16/

In Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972), this Court warned of the "danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." "Accommodation"

16/ In Fink v. Board of Education, 442 A.2d 837 (Pa. Commonwealth 1982), app. dismissed for want of a substantial federal question, ___ U.S. ___, 103 S.Ct. 1493 (1983), this Court rejected the claim that a teacher was entitled to pray publicly in his classroom at the beginning of the school day, even though these prayers were motivated by the teacher's need to ask God for His guidance at the beginning of each new school day.

where there is no clash, real or imminent, between religion and government or society poses just such risks, for it suggests governmental preference and support for religion. King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C.Cir.), cert. denied, 419 U.S. 996 (1974). That danger is particularly acute where the needless accommodation is extended to impressionable school children who are sensitive to any suggestion by school officials that they engage in a religious activity.

CONCLUSION

For the foregoing reasons, we respectfully request the Court to summarily affirm the decision of the

Court of Appeals or, in the alternative, to dismiss the appeal.

Respectfully submitted,

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*/ Amici wish to acknowledge the substantial assistance of Jonathan H. Hurwitz, a student at New York University Law School, and Richard B. Bernstein, a graduate of the Harvard Law School, in the research and preparation of this brief.